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# Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 316

UNIFORMED SANITATIONMEN ASSOCIATION, INC., *et al.*,

*Petitioners,*

—against—

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT


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# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1748

UNIFORMED SANITATIONMEN ASSOCIATION, INC., *et al.*,

*Petitioners,*

—against—

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### Preliminary Statement

Petitioners ask this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered on April 3, 1970. That judgment reversed an order of the United States District Court for the Southern District of New York.

## Question Presented

When this Court has held that neither the testimony nor the fruits of testimony of public employees, given under pain of dismissal from their employment, can be used against them in subsequent criminal proceedings and when this Court has also held that public employees may be dismissed for failure to answer their employer's questions specifically, directly and narrowly related to the performance of their official duties, was the Commissioner of Sanitation of New York City correct in dismissing the plaintiff employees who refused to answer such questions on the grounds that their answers might tend to incriminate them?

## Facts

There is no dispute as to the material facts. The individual plaintiffs were employees of New York City as of September, 1966, assigned to the East 91st Street Marine Transfer Station located on the East River in Manhattan. This is a facility of the New York City Department of Sanitation where refuse collected by both public and private garbage trucks can be transferred to barges and hauled away. Private garbage collectors are charged a fee for the use of the facility which increases with the size of the load. Dump tickets are sold to private cartmen who are required to surrender them upon entering the transfer station.

In September, 1966 the New York City Commissioner of Investigation assigned detectives to begin surveillance of the operations of the station. The Commissioner was concerned with reports that the dump tickets were not being collected and the private cartmen who used the station were paying off the employees assigned there. This practice would result in the City losing thousands of dollars in revenue.

From September 10 to 15, 1966 Detectives Meehan and Durk made observations from a nearby vantage point of privately owned trucks entering the station and stopping at the point where the dump tickets should have been surrendered.

Subsequently, under provisions of New York Law, with the approval of the Supreme Court New York County, the Commissioner of Investigation obtained a wiretap on the only telephone at the facility. This phone was leased by the Department of Sanitation for official use only and was not assigned to or intended for use by any employee for private transactions.

In November, 1966 plaintiffs were called before the Commissioner of Investigation. The plaintiffs, other than Calabrese, D'Ambrosio and Monteleone, refused to answer the questions put to them on the grounds that their answers might tend to incriminate them. The questions asked were based in part on information gained from the wiretap on the City's phone at the Transfer Station. On January 19, 1967 plaintiffs Calabrese, D'Ambrosio and Monteleone were called to testify before a grand jury and asked to sign waivers of immunity from prosecution prior to testifying. They refused.

Under Section 1123 of the New York City Charter, employees may be dismissed if they refuse to answer questions put to them by appropriate authorities on the grounds that their answers might tend to incriminate them or if they refuse to sign waivers of immunity when called to testify before a grand jury. Charges of violation of Section 1123 were brought against plaintiffs and after a hearing, as provided by Section 75 of the New York Civil Service Law, they were dismissed for violating that Section of the Charter.

Meanwhile, in December 1966, plaintiffs brought this action in an attempt to prevent their dismissal. Since at that time plaintiffs had been suspended but not yet dismissed and there was a state remedy available to them under Article 78 of the New York Civil Practice Law and Rules, the District Court granted defendants' motion to dismiss. There was also doubt at that time as to the interpretation of Section 1123 in the State Courts. The District Court based its dismissal on two grounds—prematurity and abstention.

Plaintiffs appealed to the Second Circuit Court of Appeals. Before the appeal was heard, plaintiffs had been dismissed and the New York Court of Appeals had sustained the constitutionality of Section 1123 in *Gardner* v. *Broderick*, 20 NY 2d 227 (1967), later reversed by this Court, 392 U.S. 273 (1968). The Second Circuit dealt with the case on the merits since the issue was no longer premature and there was no longer doubt as to the State construction of Section 1123. The dismissal was held to be proper despite plaintiffs objections on constitutional grounds to Section 1123 and the wiretap.

This Court granted plaintiffs petition for a writ of certiorari and, after argument, reversed this case (392 U.S. 280) along with *Gardner*, *supra* in opinions by Mr. Justice Fortas. In its opinion in this case the Court stated:

> "As we stated in Gardner v. Broderick, supra, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a re-

> sult of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of §1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights of their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. Gardner v. Broderick, supra; Garrity v. New Jersey, supra. Cf. Murphy v. Waterfront Commission, 378 U.S. 52, at 79 (1964). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." (392 U.S. 284, 285.)

After remand to the District Court for further proceedings in conformity with this Court's opinion, on July 25, 1968, the District Court entered an order reinstating the complaint, restoring plaintiffs to their jobs and directing defendants to give them all back pay and benefits due from the time of their suspension until their reinstatement. The order, however, reserved to defendants the right to take appropriate action with respect to any of the defendants who refuses "to answer questions specifically, directly and narrowly relating to the performance of his official duties" so long as he was not required to relinquish the benefits of his constitutional privilege.

On August 21, 1968 plaintiffs were reinstated and called to appear for questioning before a Deputy Administrator of the New York City Environmental Protection Administration of which the Department of Sanitation is a component.

Plaintiffs, represented by counsel, were instructed by the Deputy Administrator as follows:

> "I want to advise you . . . that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitution of this State and of the United States, including the right to be represented by counsel at this inquiry, the right to remain silent, although you may be subject to disciplinary action by the Department of Sanitation for the failure to answer material and relevant questions relating to the performance of your duties as an employee of the City of New York
>
> You are further advised that neither the answers you may give to the questions propounded to you at this proceeding, nor any information or evidence which is gained by reason of your answers may be used against you in a criminal prosecution for any false answer you may give under any applicable law including Section 1121 of the New York City Charter."

Plaintiffs were then questioned concerning the performance of their duties at the Transfer Station. The following questions are typical:

1. During the period in which you were employed at the 91st Street Marine Transfer Station in Manhattan, did you ever observe private cartmen enter that station without the required official record being made?

2. During the period in which you were employed in the 91st Street Marine Transfer Station in Manhattan, did you ever see private cartmen dump waste materials at that station without submitting the ticket book issued by the Department of Licenses?

3. Did you ever receive money from any person, on behalf of a private carting company in consideration for permitting them to dump waste materials at the 91st Street Marine Transfer Station?

Plaintiffs refused to answer these and other similar questions relating to their duties and claimed their refusal was justified on the basis of the constitutional privilege against self-incrimination. They further claimed that the inquiry was based upon wire tapping in violation of their constitutional rights.

On August 30, 1968 the Commissioner of Sanitation issued charges against plaintiffs stating that they refused to answer questions specifically, directly and narrowly relating to their official duties during and prior to September, 1966 and that such refusal constitutes misconduct and reflects discredit on the Department of Sanitation and the City of New York.

A hearing was held on these charges on October 31 and November 14, 1968. Witnesses were called in support of the charges who testified as to the operations of the Transfer Station. Plaintiffs stipulated that if given similar instructions before the Hearing Officer and asked the same questions again they would persist in their refusal to answer for the same reasons they gave at the August 21, 1968 inquiry conducted by the Deputy Administrator.

On the wiretap question, two detectives who made observations at the site and took notes at the time testified that they had nothing to do with the subsequent wiretap and were unfamiliar with any details concerning it. They further testified that they had briefed two attorneys in the office of the Corporation Counsel on what they had observed. The two attorneys testified that they knew nothing about the wiretap, had never heard it, read a transcript of it or had any information on it but rather had

met with the two detectives to learn of their observations of the Transfer Station. Based solely on these observations, the attorneys prepared the questions asked plaintiffs which they refused to answer for the reasons set forth above. After hearing all the testimony as to how the questions were prepared, on the final day of the hearing, November 14, 1968, plaintiffs again took the position that they would still refuse to answer for the reasons previously stated.

The Hearing Officer recommended dismissal. On February 7, 1969 the Commissioner of Sanitation dismissed the plaintiffs and the litigation resumed. Both sides moved for summary judgment. The District Court granted plaintiffs' motion on the ground that in the absence of specific authority to grant immunity under a New York Statute, the City officials had no right to dismiss plaintiffs for their refusal to testify. Defendants appealed. The Second Circuit Court of Appeals reversed.

The Circuit Court held a statutory grant of immunity was not required under the circumstances and concluded:

> "To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights."

The Circuit Court adhered to its prior ruling that the wiretap was legal and stated:

> "We turn finally to plaintiffs' renewed objection on the score of wiretapping which we rejected in the prior appeal, 383 F.2d at 369. Although "the

> 'law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense," Higgins v. California Prune & Apricot Grower, Inc., 3 F.2d 896, 898 (2d Cir. 1924), we see no reason to alter the ruling that the City did not violate former §605 of the Federal Communications Act, see People v. Canard, 357 Cal. App. 2d 444 (1967), cert. denied, 393 U.S. 912 (1968), or the Fourth Amendment, see Alderman v. United States, 394 U.S. 165, 179 n. 11 (1969), by tapping its own telephones in search of evidence against faithless employees. Indeed, so far as the Fourth Amendment is concerned, there is no need to rely on that point. Non-trespassory wiretapping was brought under the Fourth Amendment by Katz v. United States, 389 U.S. 347 (1967), which Desist v. United States, 394 U.S. 244 (1969), has held applicable only to such wiretaps conducted after December 18, 1967."

Plaintiffs then filed this petition to have this Court review subsequent developments in the case since it was last here.

## POINT ONE

**The Court of Appeals correctly held that the employee's right to be silent ends at the point where his employer has a right to be informed if the employee expects to retain his job.**

Most governmental employees, including plaintiffs, have tenure. They can be dismissed only for cause and after a hearing on notice of charges with the aid of counsel. N.Y. Civil Service Law, §75. These rights are important and

protect an employee against the arbirary action of his employer—in this case the City of New York. But the City as an employer also has rights. It need not remain passive while it is pillaged by its own employees who it believes to be corrupt. There are mutual rights and duties arising out of the employee-employer relationship that should not be equated with those existing between a prosecutor and a defendant. Plaintiffs have attempted to characterize all of the Administrative proceedings to date as criminal in nature. That approach is not warranted by the facts, the law, or sound public policy.

The decisions of this Court in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Gardner* v. *Broderick, supra, and Uniformed Sanitation Association* v. *Comm. of Sanitation, supra*, the instant case, have provided a practical framework within which the rights of the City and its employees can be maintained.

Taken together these cases state: A public employee does not give up his constitutional rights. He has a right to avoid self incrimination. Nevertheless, a public employer may require its employees to answer "questions specifically, directly and narrowly relating to the performance of their official duties on pain of dismissal." As noted by the Court in its prior opinion in *Sanitationmen*: "In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake (392 U.S. at p. 284)". This necessarily follows from the decisions in *Spevack* and *Garrity*. In *Gardner* the Court, referring to policemen in terms applicable to all public employees, stated (392 U.S. at p. 277): ". . . he is directly immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other client or principal. He is a trustee of

the public interest, bearing the burden of great and total responsibility to his public employer."

In *Garrity* certain police officers who were under investigation by the Attorney General of New Jersey had to answer the questions put to them or risk the loss of their jobs. The statements they made were later used against them in criminal proceedings and they were convicted. This Court considered the choice faced by the policemen between job forfeiture on the one hand and self-incrimination on the other. The Court concluded that the circumstances are necessarily coercive and as a result ruled that convictions based on the officers own statements must be set aside. It is clear from *Garrity* that where a public employee must choose between loss of his job or possible self-incrimination, neither the statements he makes nor the fruits of those statements can be used against him in subsequent criminal proceedings. In other words he acquires "use immunity" by reason of the circumstances and not by statute.

This Court held in *Gardner* and *Sanitationmen* that if the employee elects not to answer, then his own decision leaves the employer free to dismiss him provided the questions he refused to answer specifically, directly and narrowly related to the performance of his official duties.

There is nothing in either *Garrity, Gardner* or *Sanitationmen* to indicate that public employees could acquire immunity only by virtue of a state statute or that "transactional" immunity would be required before an employee could be dismissed for refusal to answer, as contended by plaintiffs. In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) the Court held that complete immunity from prosecution is not required in order to compel testimony. Rather, the rule is that testimony may be compelled so long as neither that testimony nor its fruits can

be used in a subsequent criminal prosecution of the witness (378 U.S. at p. 79). The District Court unfortunately erred when it concluded that, since New York had an immunity statute applicable to criminal proceedings (§619 Code of Criminal Procedure), there could be no immunity in the absence of a statue in New York. Neither absolute transactional immunity nor statute is required to obtain the formal "immunity" in question here under New York decisions. See *Application of Second Additional Grand Jury of the County of Kings*, 10 AD 2d 425 (1960), aff'd 8 N. Y. 2d 220 (1960); *People* v. *Ryan*, 11 AD 2d 155 (1960).

In practical operation "use immunity" is "acquired" more than "granted". If a public employee elects to answer pertinent questions about his duties he acquires immunity because the situation is coercive—if he does not answer he may be dismissed. As Mr. Justice Black stated for the Court in *Adams* v. *Maryland*, 347 U.S. 179 (1954) a "witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute (at p. 181)."

The situation is similar to those before the Court in *Mapp* v. *Ohio*, 367 U.S. 643 (1961) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). These cases are examples of an exclusionary rule in operation which prevents the admission of evidence or statements obtained illegally. The same pattern is applicable here not because the statements are obtained illegally but because the employee is compelled to cooperate with his employer.

The plaintiffs here faced the same choice as the policemen in *Garrity*. They were required to testify or risk the loss of their jobs. Their refusal to testify under the facts of this case where the City faced the loss of thou-

sands of dollars in revenue clearly warranted their dismissal. See *Silverio* v. *Municipal Court of the City of Boston*, Mass. , 247 N.E. 2d 379 (1969), cert. den. 396 U.S. 878 (1969).

In sustaining the dismissals in this case the Court of Appeals for the Second Circuit stated:

> "The proceeding here involved no attempt to coerce relinquishment of constitutional rights, because public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs; their right, conferred by the Fifth Amendment itself, as construed in *Garrity* is simply that neither what they say under such compulsion nor its fruits can be used against them in a subsequent prosecution."

## POINT TWO

**The wiretap in this case was lawfully obtained but no information gained from the wiretap was used in the present proceeding in any event. The wiretap is now irrelevant to any issue before the Court.**

When the Commissioner of Investigation questioned plaintiffs in November, 1966 he had available information developed first by the direct observations of detectives assigned to conduct a visual surveillance of the Transfer Station and later information obtained by other investigators assigned to monitor a wiretap authorized by the New York State Supreme Court under §813-a of the Code of Criminal Procedure. In the first appeal in this case the Second Circuit sustained the validity of the wiretap and stated:

> "The protection of privacy is not involved in our case where the conversations overheard were carried on in the course of the City's business over a telephone leased by the City for the purpose of such official use."

In its last decision in this case this Court did not reach the wiretap issue. See 392 U.S. 285, f.n.6. Following the remand by this Court, the Hearing Officer, who heard the testimony as to how the questions asked plaintiffs in August, 1968 were prepared, concluded:

> "As to the hearing conducted on August 21, 1968, the record discloses that the questions . . . propounded to respondents . . . were based solely upon the visual observations made by Detectives Meehan and Durk at the East 91st Street Marine Transfer Station prior to the installation of the wiretap. I conclude that these questions were not based upon the fruits of any wiretap, whether legal or illegal."

The District Court on the present appeal stated: "I consider myself bound by the ruling of the Court of Appeals on the wiretap issue. The Court's decision on that issue, which I regard as correct, is the law of this case" (Appendix D 37a).

On Appeal the Second Circuit adhered to its prior ruling and said: "The City did not violate former §605 of the Federal Communications Act . . . or the Fourth Amendment . . . by tapping its own telephone in search of evidence against faithless employees (Appendix B, 23a)."

Neither the Federal Communications Act nor the Constitution was violated by the wiretap here. *U.S.* v. *Collins*, 349 F.2d 863 (1965); *U.S.* v. *Beckley*, 259 F. Supp.

567 (1965); *State* v. *Giardina*, 27 N.J. 313 (1955); *People* v. *Canard*, 257 Cal. App. 2d 444 (1967), cert. den. 393 U.S. 912 (1968); *Alderman* v. *U.S.*, 394 U.S. 165 (1969).

In *Katz* v. *U.S.*, 389 U.S. 347 (1967) the Court held the Fourth Amendment should bar evidence obtained from "bugging" a public phone where anyone who came to the booth and paid the toll would expect to have privacy. Here the phone was not private in any sense of the word. It was charged to the City for official use only. Moreover the owner of the premises, the City, consented to and conducted the tap. In considering the application of the rule in *Katz*, this Court noted in *Alderman* v. *U.S.*, *supra*, that:

> "Those who converse and are overheard when the owner is not present also have a valid objection unless the owner of the premises has consented to the surveillance." (394 U.S. at p. 179, f.n. 11)

The tap in this case was concluded in 1966. It should not be held to violate the rules declared in *Katz* or *Lee* v. *Florida*, 392 U.S. 378 (1968) since both were decided later and have been held to apply prospectively only. *Desist* v. *United States*, 394 U.S. 244 (1969) and *Fuller* v. *Alaska*, 393 U.S. 80 (1968).

Aside from the legality of the tap, the record shows that it was not the source of any questions put to the plaintiffs which they refused to answer beginning in August, 1968. The record also shows that the surveillance preceded the wiretap and that the detectives involved in the surveillance knew nothing of the subsequent wiretap. The questions asked plaintiffs were based solely on information derived from surveillance, as found by the Hearing Officer who heard the testimony. The wiretap question has long since gone out of this case. The wiretap and any questions as to its legality have become irrelevant to any issue before this Court.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Respectfully submitted.

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Dated: New York, N. Y.
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